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# In the Supreme Court of the United States

OCTOBER TERM, 1952

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No. 588

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THE WARNER & SWASEY COMPANY, *Petitioner*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, and MAURICE HIRSCH, EDWIN H. BARKLEY, JOHN R. PAULL, H. C. MAULL, JR., GEORGE P. LUCE and NORMAN L. BURTON, Members Thereof, and the UNITED STATES and RECONSTRUCTION FINANCE CORPORATION

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 244-248) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 271-273) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1952 (R. 274). The petition for a writ of certiorari was filed on February 5, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTIONS PRESENTED

1. Whether the July 1, 1943, amendment of the Renegotiation Act, which authorized renegotiation of contracts and subcontracts with the Defense Plant Corporation and provided that "all the provisions" of the existing renegotiation legislation should be applicable, subjected to renegotiation Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 28, 1942, the date of the First Renegotiation Act, but prior to July 1, 1943.

2. Whether the July 1, 1943 amendment, as so applied, is constitutional.

## STATUTES INVOLVED

The provisions of the First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, Title IV, 56 Stat. 226, 245), as amended by the Revenue Act of 1942 (Act of October 21, 1942, Title VIII, 56 Stat. 798, 982) and the Military Appropriation Act of 1944 (Act of July 1, 1943, 57 Stat. 347), are set forth in pertinent part in the Appendix, *infra,* pp. 16-24.

**STATEMENT**

These proceedings challenge the applicability of the July 1, 1943, amendment of the Renegotiation Act to petitioner's Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 28, 1942, the date of the First Renegotiation Act, but prior to July 1, 1943. The uncontroverted facts are as follows:

On May 28, 1946, the War Contracts Price Adjustment Board unilaterally determined that petitioner's excess profits on contracts and subcontracts with the Defense Plant Corporation with respect to its fiscal year ending December 31, 1943, amounted to $6,500,000. (R. 47-48, 92.) On August 26, 1946, the Reconstruction Finance Corporation Price Adjustment Board unilaterally determined that petitioner's excessive profits on contracts and subcontracts with the Defense Plant Corporation with respect to its fiscal year ending December 31, 1942, amounted to $5,497,833. (R. 69-72, 96.)

On August 14, 1946 (R. 9) and on November 21, 1946 (R. 49), petitioner filed petitions in the Tax Court of the United States for a redetermination of these unilateral determinations. These petitions attacked the determinations as erroneous and challenged the constitutionality of the Renegotiation Act (R. 12-16, 52-55).

On July 28, 1949, subsequent to the decision of this Court in *Lichter* v. *United States,* 334 U. S. 742, the parties entered into stipulations wherein

it was agreed as follows (R. 91-94, 95-98): With respect to petitioner's 1942 fiscal year, it was stipulated that if the Renegotiation Act is applicable to and constitutionally subjects to renegotiation all of petitioner's Defense Plant Corporation contracts and subcontracts which were completed and paid for after April 27, 1942, but prior to July 1, 1943, the agreed amount of excessive profits is $5,836,450.87 (before application of the tax credit pursuant to Section 3806 of the Internal Revenue Code). It was further stipulated that if the Act is not thus applicable, the agreed amount of excessive profits is $76,697.35 (R. 97). With respect to petitioner's 1943 fiscal year, it was similarly stipulated that the agreed amount of excessive profits is $6,836,471.86, if the Act is retroactive and constitutional and, if not, $4,201,008.82 (R. 92-93).

On August 9, 1949, pursuant to a joint motion and stipulation of the parties, the proceedings were placed on the reserve calendar of the Tax Court under Rule 27(d) of the Rules of Practice of that court pending decision of the Court of Appeals for the District of Columbia Circuit (the court below) in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation* (R. 93, 98, 107). In the decision of the latter case, that court held that the Renegotiation Act, as amended, was constitutionally applicable to Defense Plant Corporation contracts fully performed prior to July 1, 1943. 177 F. 2d 727, certiorari denied, 339 U. S. 912. Following the reconsideration and approval of

that construction of the Renegotiation Act by the court below in *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99, the proceedings were removed from the reserve calendar on December 6, 1950 (R. 125), and were heard by the Tax Court on June 28, 1951 (R. 214).

On the authority of these cases, *Lichter* v. *United States,* 334 U. S. 742, and *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, the Tax Court held that the "Renegotiation Act of 1942, as amended July 1, 1943, applies to and subjects to renegotiation Defense Plant Corporation contracts and subcontracts fully performed prior to July 1, 1943, and that as so construed the act is not unconstitutional." (R. 247-248.) In accordance with the stipulations, the Tax Court found that petitioner's excessive profits were $5,836,450.87 in 1942 and $6,836,471.86 in 1943 (R. 248, 249). The court below affirmed, stating that "we are not persuaded to reexamine these questions, twice decided by us" (R. 273).

**ARGUMENT**

In accord with its earlier decisions in *Blanchard Machine Co.* v. *Reconstruction Finance Corporation,* 177 F. 2d 729, certiorari denied, 339 U. S. 912, and *Eastern Machinery Co.* v. *Under Secretary of War,* 182 F. 2d 99, and with the decision of the Court of Appeals for the Sixth Circuit in *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, the court below has held that the July 1, 1943 amendment of the Renegotiation Act is applicable,

as a matter of statutory construction, to Defense Plant Corporation contracts and subcontracts completed and fully paid for between April 28, 1942, and July 1, 1943, and that the amendment is constitutional as so construed. Petitioner advances substantially the same arguments which were presented to this Court in the *Blanchard* case. The considerations which led to the denial of certiorari in that case are equally applicable here and further review is not warranted.

1. Contrary to petitioner's suggestion (Pet. 15-16), it is plain on the face of the July 1, 1943, amendment (*infra*, p. 23) that it was designed to apply retroactively to DPC contracts completed and fully paid for after April 28, 1942, but prior to the date of the amendment. The purpose of the new subsection (k), added by that amendment, was to make applicable to DPC and the other named RFC subsidiaries "all the provisions" of the existing Renegotiation Act, one of which (Section 403(c)(6), as amended by the Act of October 21, 1942) provided, *inter alia*, that the Act—

> * * * shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made * * * unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942 * * * [*infra*, p. 22].

To construe subsection (k) not to operate to make the July 1, 1943 amendment retroactive to

April 28, 1942 would be to disregard completely the phrase "all the provisions." Indeed, it would result in making subsection (k) redundant. If Congress had intended the amendment to apply only to those DPC contracts which were still executory on July 1, 1943, and not to those agreements on which final payment had been made prior thereto but since April 28, 1942, it might have accomplished this purpose by merely amending Section 403(a) (see Appendix, *infra,* p. 16) to include the various RFC subsidiaries in the definition of "Secretaries." *United States* v. *Howell Electric Motors Co.,* 78 F. Supp. 627, 630 (E.D. Mich.), affirmed, 172 F. 2d 953 (C.A. 6); *National Electric Welding Machines Co.* v. *Stimson,* 10 T. C. 49, 56-58.

In addition, the legislative history of subsection (k) shows that it was included for the precise purpose of making the July 1, 1943, amendment retroactive to April 28, 1942. The Military Establishment Appropriation Bill for 1944, as it passed the House, authorizing renegotiation by the RFC subsidiaries, did not contain the critical subsection (k). Subsection (k) appeared for the first time after conference between the two Houses of Congress.[1] The inclusion of that subsection was a di-

[1] The amendment authorizing renegotiation by RFC subsidiaries, without subsection (k), was offered on the House floor by Representative Case; it was agreed to and passed by the House without explanation or discussion. 89 Cong. Rec. 6176. The Senate Appropriations Committee, however, deleted the entire House amendment, indicating that it "did

rect consequence of a letter dated June 24, 1943, from John D. Goodloe, RFC General Counsel, to Senator Elmer Thomas, Chairman of the War Department Subcommittee of the Senate Appropriations Committee which considered the House bill. That letter proposed that subsection (k) be incorporated, "if the Congress selects the date, April 28, 1942, as contained in the present statute," as fixing the date as to which "the statute is to apply to uncompleted contracts of subsidiaries of the Reconstruction Finance Corporation."[2] According to testimony of Senator Thomas, who was also chairman of the Senate conferees and of the joint conference committee, he received the Goodloe letter after the bill had been sent to conference; he read the entire letter to the conference committee, which agreed that the subsection (k) language, as suggested in the letter, should be used; and he subsequently clipped the agreed portions from the letter and personally prepared the amendment in the ex-

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not have time to go into the subject" (89 Cong. Rec. 6581; S. Rep. No. 357, 78th Cong., 1st Sess., p. 7), and the bill passed the Senate without any provision dealing with renegotiation. 89 Cong. Rec. 6587. In conference, the substance of the House amendment was reinstated and subsection (k) was added. H. Rep. No. 620, 78th Cong., 1st Sess., pp. 1-2; 89 Cong. Rec. 6828-9.

[2] The letter also proposed an alternative clause if Congress should desire to make the amendment prospective only. The full text of the Goodloe letter appears in Hearings before the Committee on Ways and Means, House of Representatives, 78th Cong., 1st Sess., on H. R. 2324, H. R. 2698, and H. R. 3015 (Sept. 1943), pp. 200-201.

act form in which it was enacted (R. 174-180).[3] This material plainly establishes that Congress, in adopting Mr. Goodloe's suggested language for subsection (k), understood and agreed with his statement that that subsection made the amendment retroactive to April 28, 1942.

Moreover, in testifying before the Ways and Means Committee of the House of Representatives, shortly after the amendment of July 1, 1943, Chairman Jones of the RFC stated:[4]

> The amendment suggested for use [by Mr. Goodloe] in the event the Congress wished to make subject to renegotiation the RFC subsidiary contracts under which final payment had not been made prior to April 28, 1942, was added in conference on the Military Appropriations Act of 1944. I call attention to this particularly since it seems to me to clearly evi-

[3] Consideration of this material, although not embodied in an official report, is permissible since Senator Thomas did not give his opinion of the meaning of the statute but showed how the precise question now in question was considered by the appropriate legislative committee. See *United States* v. *Dickerson*, 310 U. S. 554, 562; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 544. The district court, in *United States* v. *Howell Electric Motors Co.*, 78 F. Supp. 627 (E. D. Mich.), affirmed, 172 F. 2d 953 (C. A. 6), accepted affidavits of Senator Thomas and Mr. Goodloe, to the same effect as their testimony incorporated in the record here as "competent corroboratory testimony," although it held the testimony unnecessary since the meaning of the July 1, 1943, amendment was sufficiently clear on its face. 78 F. Supp. at 630-631.

[4] See Hearings, *supra*, fn. 2, p. 187.

dence the intention of the Congress that the amendment was to be retroactive in its application to the contracts of the four RFC subsidiaries.

Although this administrative construction was thus specifically called to the attention of the Committee then dealing with over-all revision of the Renegotiation Act, there was, and has been, no suggestion of congressional disapproval. The Second Renegotiation Act (Revenue Act of 1943, Title VII, Act of February 25, 1944, 58 Stat. 21, 78-93), which eventuated from the studies of the Ways and Means Committee, did not seek to change the administrative interpretation that the July 1, 1943 amendment was retroactive. In these circumstances, it is indisputably plain that subsection (k) was designed by Congress to make the July 1, 1943 amendment retroactive to business done since April 28, 1942.

2. Petitioner's attack on the constitutionality of the application of the July 1, 1943, amendment to contracts and subcontracts completed and fully paid for prior to July 1, 1943, does not, contrary to petitioner, arise in this Court as an original question. This contention has already been determined in favor of the Act's validity in *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, decided *per curiam* on the same day as, and on the authority of, *Lichter* v. *United States,* 334 U. S. 742. Throughout the *Lincoln Electric*

litigation, the contractor claimed that the Secretary of the Navy improperly included sales in the calendar year 1942 to DPC and its contractors and subcontractors in the contractor's renegotiable business, upon which the Secretary's unilateral order there involved was based. The contractor specifically contended that if the July 1, 1943, amendment did so apply, it was invalid. Inasmuch as this Court, unlike the district court (77 F. Supp. 444, 447), decided the merits of the controversy, it necessarily determined the constitutional issues raised in regard to the July 1, 1943, amendment.

Moreover, apart from *Lincoln Electric*, petitioner's claim has no merit. The *Lichter* case has authoritatively sustained the constitutionality of the Renegotiation Act as applied retroactively to subcontracts entered into before the passage of the original statute (on April 28, 1942), but upon which final payment had not been made. 334 U. S. at 788-789. Further, *Alexander Wool Combing Co.* v. *United States* (decided together with *Lichter*, 334 U. S. 742), held that certain subcontracts entered into between April 28, 1942, and October 21, 1942, could validly be renegotiated under the amendment of October 21, 1942, although the original Act might not have subjected these agreements to renegotiation. 334 U. S. at 789.

Petitioner attempts to distinguish the *Lichter* case on the ground that petitioner's contracts and subcontracts were not executory but had

been fully performed and paid for prior to the enactment of the July 1, 1943, amendment, and had become vested property rights. But "the mere circumstance that the contractor here has received full remuneration on the transactions involved is a distinction without substance." *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, 954 (C.A. 6). For this Court, in sanctioning retroactive statutes reducing contract rights—where there is a reasonable basis and a good cause for such diminution—has not rationalized the cutting-off of accrued contract rights on the ground that such rights differ from property; on the contrary, this Court has upheld such legislation despite its acceptance of such contract interests as property rights. *Calhoun* v. *Massie,* 253 U. S. 170, 176; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-308, 309, 310; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603; *Wright* v. *Union Central Insurance Co.,* 304 U. S. 502, 515-516; *Block* v. *Hirsh,* 256 U. S. 135; *Bowles* v. *Willingham,* 321 U. S. 503. Indeed, where Federal action is concerned, contract rights are accorded constitutional protection only insofar as they are deemed property rights, since the Impairment of Contracts Clause governs state action alone. Cf. *Calhoun* v. *Massie,* 253 U. S. 170, 174-176. And as Mr. Justice Brandeis said in the *Calhoun* case, "the United States may, consistently with the Fifth Amendment, impose for a per-

mitted purpose, restrictions upon property which produce" a "serious depreciation of property values." 253 U. S. at 175.[5]

That there was a reasonable basis for making the July 1, 1943, amendment retrospective to April 28, 1942, is easily demonstrable. By the original Renegotiation Act Congress undertook to recapture excessive profits from holders of contracts and subcontracts with the named government agencies. When Congress discovered that contractors with subcontracts and contracts with the Defense Plant Corporation, an important war agency, were realizing excessive profits not clearly subject to recapture, it undertook to make clear that it intended to apply its general policy to all DPC sales made since the date the general policy was declared. This was a reasonable course of action, both from the standpoint of protecting the public treasury and also as a measure of equalization among war

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[5] An especially forceful analogy to the recovery by renegotiation of net profits realized under executed contracts is retroactive income taxation, which has long been held valid. *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 423 (C.A. 9). See *e.g., Welch* v. *Henry*, 305 U. S. 134, 150; *United States* v. *Hudson*, 299 U. S. 498; *Cooper* v. *United States*, 280 U. S. 409, 411. The cases in which certain retrospective gift taxation had been invalidated (*Nichols* v. *Coolidge*, 274 U. S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U. S. 440) (relied on by petitioner, Pet. 14) were distinguished in *Welch* v. *Henry, supra*, on the ground that in those cases the donors might have refrained from making the gifts had they known of or anticipated the gift tax, but it could not be said that the taxpayer would have been deterred from receiving income by knowledge that it might thereafter be taxed (305 U. S. at 147-148).

contractors. In these circumstances, the reduction in the value of contractors' rights to the full payments made before July 1, 1943, no more invalidates the July 1, 1943, amendment than did the reduction in the value of the accrued rights—to payments made as well as money owed—of the contractors originally made subject to renegotiation on April 28, 1942. The effective period of retroactivity in this case—at most a year and one quarter—does not exceed that often applicable under the original Act,[6] or under the rent-control, gold-clause, mortgage-moratorium or deficiency-judgment statutes, already sanctioned by this Court. See *e.g., Bowles* v. *Willingham,* 321 U. S. 503; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398; *Gelfert* v. *National City Bank,* 313 U. S. 221.

Moreover, in view of the controversy which took place as to whether the DPC contracts were covered by the original Act,[7] the express extension of the Act to such DPC business could hardly take DPC's contractors or subcontractors by surprise.

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[6] For example, many naval ship-construction contracts executed before March of 1941 were still in existence on April 28, 1942, and therefore subject to renegotiation.

[7] Although the RFC did not itself believe that its subsidiaries' contracts were negotiable under the First Renegotiation Act, other Government officials took a contrary view (R. 189-192, 196-199). See "Joint Statement by the War, Navy and Treasury Departments and Maritime Commission," dated March 31, 1943, p. 12.

In the view most favorable to petitioner, the July 1, 1943, amendment merely extended the reach of legislative control on a subject matter, excessive war profits, which had been the subject of prior regulation; and when petitioner made DPC sales in 1942 and 1943, it made them "subject to further legislation upon the same topic." *Veix* v. *Sixth Ward Ass'n*, 310 U. S. 32, 38. Such retroactivity hardly constitutes an unreasonable or arbitrary, or even an unanticipated, interference with petitioner's expectations. Cf. *United States* v. *Hudson*, 299 U. S. 498, 501; *Milliken* v. *United States*, 283 U. S. 15, 22-24; see also *Illinois Central R. R. Co.* v. *Minnesota*, 309 U. S. 157, 164-5.

## CONCLUSION

The judgment of the court below is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1953.

**APPENDIX**

1. The First Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Act of April 28, 1942, Title IV, 56 Stat. 226, 245) provides:

> SEC. 403. (a) For the purposes of this section, the term "Department" means the War Department, the Navy Department, and the Maritime Commission, respectively; in the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission; and the terms "renegotiate" and "renegotiation" include the refixing by the Secretary of the Department of the contract price. For the purposes of subsections (d) and (e) of this section, the term "contract" includes a subcontract and the term "contractor" includes a subcontractor.
>
> (b) The Secretary of each Department is authorized and directed to insert in any contract for an amount in excess of $100,000 hereafter made by such Department (1) a provision for the renegotiation of the contract price at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty; (2) a provision for the retention by the United States or the repayment to the United States of (A) any amount of the contract price which is found as a result of such renegotiation to represent ex-

cessive profits and (B) an amount of the contract price equal to the amount of the reduction in the contract price of any subcontract under such contract pursuant to the renegotiation of such subcontract as provided in clause (3) of this subsection; and (3) a provision requiring the contractor to insert in each subcontract for an amount in excess of $100,000 made by him under such contract (A) a provision for the renegotiation by such Secretary and the subcontractor of the contract price of the subcontract at a period or periods when, in the judgment of the Secretary, the profits can be determined with reasonable certainty, (B) a provision for the retention by the United States or the repayment to the United States of any amount of the contract price of the subcontract which is found as a result of such renegotiation, to represent excessive profits, and (C) a provision for relieving the contractor from any liability to the subcontractor on account of any amount so retained by or repaid to the United States.

(c) The Secretary of each Department is authorized and directed, whenever in his opinion excessive profits have been realized, or are likely to be realized, from any contract with such Department or from any subcontract thereunder, (1) to require the contractor or subcontractor to renegotiate the contract price, (2) to withhold from the contractor or

subcontractor any amount of the contract price which is found as a result of such renegotiation to represent excessive profits, and (3) in case any amount of the contract price found as a result of such renegotiation to represent excessive profits shall have been paid to the contractor or subcontractor, to recover such amount from such contractor or subcontractor. Such contractor or subcontractor shall be deemed to be indebted to the United States for any amount which such Secretary is authorized to recover from such contractor or subcontractor under this subsection, and such Secretary may bring actions in the appropriate courts of the United States to recover such amount on behalf of the United States. All amounts recovered under this subsection shall be covered into the Treasury as miscellaneous receipts. This subsection shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, provided that final payment pursuant to such contract or subcontract has not been made prior to the date of enactment of this Act.

(d) In renegotiating a contract price or determining excessive profits for the purposes of this section, the Secretaries of the respective Departments shall not make any allowance for any salaries, bonuses, or other com-

pensation paid by a contractor to its officers or employees in excess of a reasonable amount, nor shall they make allowance for any excessive reserves set up by the contractor or for any costs incurred by the contractor which are excessive and unreasonable. For the purpose of ascertaining whether such unreasonable compensation has been or is being paid, or whether such excessive reserves have been or are being set up, or whether any excessive and unreasonable costs have been or are being incurred, each such Secretary shall have the same powers with respect to any such contractor that an agency designated by the President to exercise the powers conferred by title XIII of the Second War Powers Act, 1942, has with respect to any contractor to whom such title is applicable. In the interest of economy and the avoidance of duplication of inspection and audit, the services of the Bureau of Internal Revenue shall, upon request of each such Secretary and the approval of the Secretary of the Treasury, be made available to the extent determined by the Secretary of the Treasury for the purposes of making examinations and determinations with respect to profits under this section.

(e) In addition to the powers conferred by existing law, the Secretary of each Department shall have the right to demand of any

contractor who holds contracts with respect to which the provisions of this section are applicable in an aggregate amount in excess of $100,000, statements of actual costs of production and such other financial statements, at such times and in such form and detail, as such Secretary may require. Any person who willfully fails or refuses to furnish any statement required of him under this subsection, or who knowingly furnishes any such statement containing information which is false or misleading in any material respect, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or imprisonment for not more than two years, or both. The powers conferred by this subsection shall be exercised in the case of any contractor by the Secretary of the Department holding the largest amount of such contracts with such contractor, or by such Secretary as may be mutually agreed to by the Secretaries concerned.

(f) The authority and discretion herein conferred upon the Secretary of each Department, in accordance with regulations prescribed by the President for the protection of the interests of the Government, may be delegated, in whole or in part, by him to such individuals or agencies in such Department as he may designate, and he may authorize such individuals or agencies to make further delegations of such authority and discretion.

(g) If any provision of this section or the application thereof to any person or circumstance is held invalid, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby.

(h) This section shall remain in force during the continuance of the present war and for three years after the termination of the war, but no court proceedings brought under this section shall abate by reason of the termination of the provisions of this section.

2. The Revenue Act of 1942 (Act of October 21, 1942, Title VIII, 56 Stat. 798, 982) provides in pertinent part as follows:

Sec. 801. RENEGOTIATION OF WAR CONTRACTS.

(a) Subsections (a), (b), and (c) of section 403 of the Sixth Supplemental National Defense Appropriation Act (Public 528, 77th Cong., 2d Sess.), are amended to read as follows:

Sec. 403. (a) For the purposes of this section—

(1) The term "Department" means the War Department, the Navy Department, the Treasury Department, and the Maritime Commission, respectively.

(2) In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission.

* * * * *

(c) * * * (6) This subsection (c) shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made, whether or not such contracts or subcontracts contain a renegotiation or recapture clause, unless (i) final payment pursuant to such contract or subcontract was made prior to April 28, 1942, or (ii) the contract or subcontract provides otherwise pursuant to subsection (b) or (i), or is exempted under subsection (i), of this section 403, or (iii) the aggregate sales by the contractor or subcontractor, and by all persons under the control of or controlling or under common control with the contractor or subcontractor, under contracts with the Departments and subcontracts thereunder do not exceed, or in the opinion of the Secretary concerned will not exceed, $100,000 for the fiscal year of such contractor or subcontractor.

No renegotiation of the contract price pursuant to any provision therefor, or otherwise, shall be commenced by the Secretary more than one year after the close of the fiscal year of the contractor or subcontractor within which completion or termination of the con-

tract or subcontract, as determined by the Secretary, occurs.

3. The Military Appropriation Act of 1944 (Act of July 1, 1943, 57 Stat. 347) provides in pertinent part as follows:

* * * *Provided further,* That clauses (1) and (2) of subsection (a) of section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, are amended to read as follows:

Sec. 403. (a) For the purposes of this section—

1. The term "Department" means the War Department, the Navy Department, the Treasury Department, the Maritime Commission, Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, respectively.

2. In the case of the Maritime Commission, the term "Secretary" means the Chairman of such Commission, and in the case of Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company, the term "Secretary" means the board of directors of the appropriate corporation.

*Provided further,* That section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, as amended, is further amended by adding at the end thereof the following subsection:

(k) All the provisions of this section shall be construed to apply to Defense Plant Corporation, Metals Reserve Company, Defense Supplies Corporation, and Rubber Reserve Company.

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# In the Supreme Court of the United States

OCTOBER TERM, 1952.

## No. 588.

Supreme Court, U.S.
FILED
MAR 18 1953
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THE WARNER & SWASEY COMPANY,
*Petitioner,*

v.

WAR CONTRACTS PRICE ADJUSTMENT BOARD, and MAURICE HIRSCH, EDWIN H. BARKLEY, JOHN R. PAULL, H. C. MAULL, JR., GEORGE P. LUCE and NORMAN L. BURTON, Members Thereof, and the UNITED STATES

and

RECONSTRUCTION FINANCE CORPORATION,
*Respondents.*

## REPLY BRIEF OF PETITIONER.

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## REPLY BRIEF OF PETITIONER.

Respondents' brief in this proceeding requires comment.

1. One would gather to read Respondents' brief that the constitutional issue presented here has already been decided by this Court. This is Respondents' first main argument. It is unfounded.

Three cases are cited. Of these, *Lincoln Electric Co. v. Forrestal,* 334 U. S. 841 (1948), was no more than a one-sentence per curiam decision of this Court affirming a procedural decision of the District Court that the United States was not a defendant in the action and that a federal contractor who had failed to pursue his administrative remedy was not entitled to maintain the action. 77 F. Supp. 444 (D. D. C. 1944). As for *Alexander Wool Combing Co. v. United States* (decided together with

*Lichter v. United States*, 334 U. S. 742 (1948)), it did not concern contracts entered into before the enactment of the original Renegotiation Act. As the Court remarked at page 788, all contracts involved in the litigation, with the exception of four in the *Lichter* case, were entered into after the date of enactment of the original Renegotiation Act and on those four, final payment had not been made by that date. Finally, Respondents cite *Blanchard Machine Co. v. Reconstruction Finance Corporation, Price Adjustment Board*, 177 F. 2d 727 (D. C. Cir. 1949), in which case this Court denied certiorari. 339 U. S. 912 (1950). It should no longer be necessary to cite authority for the proposition that denial of certiorari imports no viewpoint on the merits.

The important constitutional question presented by this petition has not been decided by this Court.

2. Respondents' second major argument is that there is no room for doubt or construction as to the retroactivity of the statute. Whether Respondents themselves are entirely convinced of the inevitability of this reading of the statute is thrown into some doubt by the excursion which they feel called upon to make into the field of obscure legislative history. A petition for certiorari, and most particularly a reply brief on a petition for certiorari, is no place in which to engage in debate on the intricacies of legislative history. Some measure of Respondents' strength on this issue, however, may be given by the fact that their legislative history citations are drawn from (i) testimony before a committee, not included in a committee report and never called to the attention of the Congress, and (ii) statements of administrative officials made subsequent to the enactment of the statute by Congress.

As indicated in Petitioner's brief-in-chief, the language contained in the July 1, 1943 amendment is hardly

self-executory. And certainly it does not command retroactivity with the tone of authority or the specificity required by this Court's decisions to sustain retrospective application of legislation.

3. Finally, Respondents advance arguments why Congress might have desired to enact a retroactive renegotiation act. If the statute is so read, these are exactly the reasons which should be weighed by this Court against the considerations advanced by Petitioner and against the great burden of demonstration which proponents of retroactive legislation must always be prepared to assume. Contrary to the impression which Respondents attempt to create in their brief, Petitioner has not sought to press its case here on a mechanical theory of vested rights and inviolable privilege immune from adjustment with the competing demands of society. Petitioner agrees with Respondents that narrowly defined areas of retroactivity are permissible where the totality of the considerations in the particular instance require.

Whether the considerations advanced by Respondents require extension of these limits of permissible retroactivity is the very problem presented to the Court by this petition. Its importance justifies its decision.

## CONCLUSION.

For the reasons advanced in the petition and in this reply brief, it is respectfully submitted that the petition for a writ of certiorari in this proceeding should be granted.

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